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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHTER Justice PART 24

CHESLOW, YAFFA

-v-

CONSTANCE HUTTNER

INDEX NO. 102658/05

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

OCT 23 2006

COUNTY

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Conf 11/1 - noon

Dated: 10/17/06

ROSALYN RICHTER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

YAFFA CHESLOW, Plaintiff, -against- CONSTANCE HUTTNER, Defendant.	DECISION AND ORDER Index No. 102658-06 Motion Sequence No. 2

Richter, J.:

In this motion, plaintiff Yaffa Cheslow moves for summary judgment on her claim for partition and sale of a single family townhouse owned by her and defendant Constance Huttner.[1] The following facts are not in dispute. Cheslow and Huttner were involved in a personal relationship from the spring of 2001 until December 2005. In the summer of 2003, they began living together and filed for a Certificate of Domestic Partnership. On December 31, 2003, Cheslow and Huttner purchased the townhouse pursuant to a contract of sale for several million dollars. The deed reflecting the transfer of the house states that Huttner and Cheslow own the property as "tenants in common, a one-half undivided interest to each." In December 2005, Cheslow moved out of the townhouse. According to Cheslow, after she left, Huttner locked her out of the premises, an allegation Huttner denies.

Cheslow argues that summary judgment is appropriate and that she is entitled to an immediate sale of the property and 50% of the proceeds because the deed clearly and unequivocally declares that she and Huttner each owns a one-half interest in the premises. Cheslow contends that no hearing is required before the proceeds are distributed. Although Huttner concedes that the

[1] With the consent of the parties, the Court severed the partition claim from the remainder of the action.

property should ultimately be sold and that Cheslow is entitled to some of the profits, Huttner vigorously disputes that Cheslow is entitled to a 50% share. Huttner argues that Cheslow's ownership interest is significantly smaller because Huttner provided the bulk of the down payment and carrying costs for the property. In addition, Huttner maintains that the parties had an oral agreement as to the proper disposition of the townhouse in the event the couple ended their relationship.

It is well-settled that one who holds an interest in real property as a tenant in common may bring an action against another tenant-in-common for the partition or sale of the property. RPAPL § 901[1]; *Piccirillo v. Friedman*, 244 A.D.2d 469 (2d Dept. 1997). Here, there is no dispute that Cheslow owns the townhouse as a tenant in common with Huttner. In a conference call with the Court, the parties agreed that a physical partition of the townhouse would not be practical. Based on this discussion and the facts contained in the parties papers, the Court concludes that a sale is appropriate because "a [physical] partition cannot be made without great prejudice to the owners." RPAPL § 901[1]. The property in question is a single family townhouse and it would not be possible for Cheslow and Huttner to live there together in light of the obvious level of animosity between them. Indeed, at a conference before this Court where the parties were present, the tension between them was palpable. Nor has either party suggested that the townhouse could be renovated to allow the two to live in separate parts of it. Thus, the Court concludes that Cheslow is entitled to a sale of the property. *See Loughran v. Cruickshank*, 8 A.D.3d 799 (3d Dept. 2004)(ordering sale of property rather than physical partition where court found that an actual physical division would cause great prejudice to the owners); *Barol v. Barol*, 95 A.D.2d 942 (3d Dept. 1983)(in light of the fact that there is no triable issue of fact concerning title and the plaintiff's status as a tenant in common,

summary judgment should have been granted).

However, Cheslow's request for a judicial determination that she is entitled to 50% of the proceeds of a sale must be denied at this stage because disputed factual issues exist as to the parties' equitable share in the property. "[P]artition is an equitable remedy in nature and Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property and its benefits". *Hunt v. Hunt*, 13 A.D.3d 1041, 1042 (3d Dept. 2004); *see also Ranninger v. Pevsner*, 306 A.D.2d 20 (1st Dept. 2003); *Deitz v. Deitz*, 245 A.D.2d 638 (3d Dept. 1997). Among the factors the Court should consider are the reasonable value of improvements and repairs to the property, disparities in down payments and mortgage payments and the reasonable value of rental payments with regard to an ousted co-tenant. *Vlcek v. Vlcek,* 42 A.D.2d 308 (3d Dept. 1973).

Here, Huttner maintains that she paid the bulk of the down payment and all of the closing expenses in connection with the purchase of the townhouse. Huttner also contends that she paid for all subsequent renovations to the property and made virtually all of the mortgage, tax and insurance payments. On the other hand, Cheslow points out that the plain language of the deed conclusively shows that the parties had agreed that any proceeds of a sale be evenly split. Cheslow also argues that such a division is appropriate since the parties had a committed relationship and they intended to share their joint assets equally. The Court concludes that the deed language, although strong evidence that Huttner intended to make a gift of half the townhouse to Cheslow and that a 50/50 split was intended, is not dispositive and does not preclude this Court from conducting a hearing on the equities involved. Although the deed states that Cheslow and Huttner each owns a one-half undivided interest in the property, such language could be construed simply as the parties' recognition of the rebuttable presumption that tenants in common are entitled to an equal division

of the property upon partition. *See, e.g., Lang v. Lang*, 270 A.D.2d 463 (2d Dept. 2000)(tenants in common share a rebuttable presumption that each holds an equal undivided one-half interest in the subject premises).

Cheslow's argument, if accepted, would turn this common law rebuttable presumption into an irrebuttable one and would preclude Huttner from showing that equity requires a different division from the 50/50 split contemplated by the deed. Cheslow cites no case that requires such a holding nor does she point to any policy reason to warrant this conclusion. In a partition action, this Court sits both as a court of law, which must evaluate the wording of the deed, and as a court of equity, which must consider issues of fairness and the respective contributions of the parties. Thus, the Court concludes that a hearing must be held to determine the parties' equitable share of the proceeds of the sale.[2] *See Laney v. Siewert*, 26 A.D.3d 194, 194-95 (1st Dept. 2006)("[w]hile [the] defendant's evidence that he paid virtually all of the apartment's purchase price and carrying costs is sufficient to rebut the presumption that the parties are entitled to an equal number of shares on partition, . . . such evidence does not resolve what, if anything, [the] plaintiff's share should be. That issue . . . requir[es] . . . consideration of the various equities . . . including the nature of the parties' relationship and whether . . . [the] defendant intended his disparate contributions to be a gift"); *see also McVicker v. Sarma*, 163 A.D.2d 721 (3d Dept. 1990); *Hunt v. Hunt*, 13 A.D.3d at 1041; *Ranninger v. Pevsner*, 306 A.D.2d at 20; *Deitz v. Deitz*, 245 A.D.2d at 638; *Barol v. Barol*, 95

[2] *Dalmacy v. Joseph*, 297 A.D.2d 329 (2d Dept. 2002), does not require a different result. In that case, the Court merely ordered a partition sale but did not specify how the proceeds were to be distributed. Moreover, a review of the record on appeal shows that the respective shares of the parties was not in dispute. Rather, the focus of the appeal was whether the plaintiff had a sufficient possessory interest in the property to maintain a partition action, something that is not in dispute here.

A.D.2d at 942.[3] Accordingly, it is

ORDERED that Cheslow's motion for summary judgment on the partition claim is granted to the extent that the property should be sold after the Court determines at a hearing how the proceeds should be divided in accordance with the equities; and it is further

ORDERED that the parties shall appear for a pre-hearing conference on November 1, 2006 at 12:00 noon.

This constitutes the decision and order of the Court.

October 17, 2006

Justice Rosalyn Richter

[3] There is no merit to Huttner's contention that her claim of promissory estoppel against Cheslow should bar any sale of the premises because a defense of estoppel is not available in a partition action. *Grossman v. Baker*, 182 A.D.2d 1119 (4th Dept. 1992).